



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 229 OF 2011

In the matter of the Estate of ABUBAKAR IRETI KARUIRU (Deceased)

ZAINAB WAMBERE.....1ST APPLICANT

FATUMA WAMBUGI.....2ND APPLICANT

V E R S U S

HALIMA MUTHONI.....1ST RESPONDENT/PETITIONER

KAIMU ABUBAKARA.....2ND RESPONDENT/PROTESTER

HASIA ABUBAKAR.....3ED RESPONDENT/PROTESTER

R U L I N G

1. This is the application dated 23/01/2017 seeking for orders for review, setting aside and/or vacate the ruling orders issued on 1/11/2016 and allow the applicants application dated 16/02/2016. The orders sought to be reviewed were given in an application seeking to transfer this succession cause to the Kadhi's court which application was declined.
2. The grounds supporting the application are contained in the affidavits of Zainabu Wambere and Fatuma Wambugi sworn both on 23/01/2017. It is deposed that the 1st respondent/petitioner had no authority to swear the facts she did in her application dated 16/2/2016 to the effect that the applicants do not confess Muslim faith. The applicants argue that the court in its ruling delivered on 1/11/2016 relied on the affidavit of the 1st applicant. It is only the applicants who can personally depose on facts as to what religion they profess. The prayer is that the ruling be reviewed and that this succession cause be transferred to Kadhis court.
3. The respondents opposed the application relying on the affidavit of one Hasia Abubakar the 3rd respondent/ protester. It is deposed that the application lacks merit and it is otherwise an abuse of the due process of the court. She states that the applicants are her sisters and the matters sworn in the supporting affidavit for the application dated 1/11/2016 are correct and were not controverted by the applicants.
4. It is further deposed that the 3rd respondent does not profess the Muslim religion and that this succession cause should not be taken to the Kadhis court. It is further stated that the 1st respondent the mother of the parties herein is deceased and has not been substituted.
5. The applicants filed submissions through their counsel Eddie Njiru in which he ventilated the issues in the supporting affidavits. It is argued that since the 1st respondent herein was not authorized to swear to

the facts regarding the religion the applicants profess, there is an error apparent in the ruling of the court and that the ruling ought to be reviewed.

6. The applicants urge the court to exercise its discretion under Section 1A, 1B and 3A of the Civil Procedure Rules to set aside the order issued on 1/11/2016.

7. The issue of substitution of the 1st respondent has been raised by the 3rd respondent. The 1st respondent is the widow of the deceased and mother to the parties in this case. She was also the respondent in the application dated 16/02/2016 which gave rise to the orders hereby sought to be reviewed herein whereas two of her children were the respondents.

8. The 3rd respondent is the petitioner in this cause and as such the personal representative of the deceased and the driver in these proceedings. She was issued with the letters of administration intestate on 19/03/2012. The applicants and most of 1st respondent's other children except perhaps the applicant are either protesters or potential protesters given the background facts of this cause. She had filed her preferred mode of distribution which was followed by a protest by the 2nd and 3rd respondents that consists the preferred mode of distribution for the protesters. It is the hearing of the protest that is pending in this cause.

9. The applicants have named the deceased's widow Alima Muthoni Ileri as the 1st respondent. By the nature of the application, the petitioner is a respondent herein for she had opposed the application that gave rise to the orders complained of herein. This application cannot be prosecuted without an administrator who is the personal representative with powers conferred under section 83 of the Law of Succession Act. Any orders granted in absence of an administrator would be null and void.

10. The role played by the administrator in a succession cause is therefore very critical. The procedure must be followed for substitution in case of death of the administrator. Now that she is deceased, it is my considered opinion that no business including prosecution of any application can proceed in this case.

11. It is likely that this cause may now take a different turn because the protest herein was against the preferred mode of distribution of the administrator. The parties who are all children of the deceased are at liberty to consider settlement of the matter out of court. I say this with due respect because each of the parties herein is a rightful heir and entitled to pursue their inheritance rights.

12. In the absence of an administrator, I find this application misplaced, incompetent and bad in law.

13. It is hereby struck out with no order as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF DECEMBER, 2017.

F. MUCHEMI

J U D G E

In the absence of the parties